SAMINATHAN & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Buhagiar J.) April 13, 1955]
[K. L.—Criminal Appeal No. 11 of 1954]

Customs Ordinance, 1952, ss. 115, 131(1), (e), (g) and (2)—Smuggling—Presumption under ss. 115 and 131(2)—Rebuttal—Rules of Evidence governing burden of proof in Civil and Criminal cases—Evidence Ordinance, 1950, s. 3—"Proved"—"Beyond reasonable doubt".

In this case the appellants were charged with offences contrary to s. 131(1) (e) and (g) of the Customs Ordinance. At the close of the prosecution case the learned President held that there was no case for the defence to meet and acquitted the appellants. On appeal by the prosecution Storr J. held [(1954) M.L.J. 162] that the learned President had misdirected himself on the question of when the presumption under ss. 115 and 131(2) of the Customs Ordinance arose and ordered the case to be sent back to the learned President for him to call upon the appellants for their defence. After the appellants had given their defence, the learned President found them guilty of the charge, convicted and sentenced them.

The appellants appealed on the following grounds: (1) there was no, or no sufficient, evidence against any of the appellants which if unrebutted would have warranted a conviction; (2) if the presumption under ss. 115 and 131(2) applied to the facts proved by the prosecution, the prosecution adduced evidence of the articles and the conduct of the appellants was sufficient to rebut the said presumptions; (3) the learned President erred as to the quantum of the evidence necessary to displace the presumption of law under the provisions of the said Customs Ordinance; (4) the learned President did not give sufficient consideration to the evidence adduced by the appellants.

Held: (1) Storr J. had already decided that the prosecution had established a case and that there was sufficient evidence for the defence to be called and therefore the 1st ground must fail; (2) as to the 2nd ground the circumstances and conduct of the appellants did not rebut the presumption raised against them; (3) with regard to the 3rd ground, if the learned President had erred at all, he erred in favour of the appellants; (4) as to the last ground the evidence adduced by the appellants went to strengthen the evidence which was given for the prosecution and did not help the defence.

Held also: under s. 131(2) of the Ordinance the accused had to prove that he did not know that the goods were uncustomed or adduce such evidence as to make the existence of the fact that the accused had no knowledge that the goods were uncustomed so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that that fact existed.

[Editorial Note:— in the course of his judgement, Buhagiar J. made a thorough survey of three aspects of the law of evidence: (a) Rules of Evidence with regard to burden of proof in civil and criminal cases; (b) Evidence Ordinance, 1950, s. 3; (c) burden of proving and rebutting statutory presumptions.]

Cases referred to:—

(1) *Hurst v. Evans* (1917) 1 K.B. 352.
(2) *R. v. White* 4 F. & F. 363.
(3) *Woolmington's case* (1935) A.C. 462; 25 Cr. App. R. 72.
(4) *Mancini's case* (1942) A.C. 1; 28 Cr. App. R. 65; (1941) 3 All E.R. 272.
(5) *R. v. Kritz* (1950) 1 K.B. 82; (1949) 2 All E.R. 505; 33 Cr. App. R. 169.
(6) *R v. Summer* (1952) 1 All E.R. 1059.
(7) *Miller v. Minister of Pensions* (1947) 2 All E.R. 372; (1948) L.J.R. 203.
(8) *R. v. Burdett* 4 B. & Ald. 95.
(9) *R. v. Ward* (1915) 3 K.B. 696.
(10) *Jenkin's case* (1923) 39 T.L.R. 458.
(11) *R. v. Carr-Briant* (1943) K.B. 607; (1943) 2 All E.R. 156; 29 Cr. App. R. 76.
(12) *R. v. Cohen* (1951) 1 All E.R. 203.
(13) *Lee Guek Hon v. Public Prosecutor* (1953) M.L.J. 17.
(14) *Lok Chak Wan v. Public Prosecutor* (1939) M.L.J. 84.
(15) *R. v. Aves* (1950) 2 All E.R. 230; 34 Cr. App. R. 159.
(16) *R. v. Garth* (1949) 1 All E.R. 773; 33 Cr. App. R. 100.
(17) *R. v. Ley & Smith.* Notable British Trials p. 286.

MAGISTRATE'S CRIMINAL APPEAL.

N. L. Macassey for the appellants.

E. Brown (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Buhagiar J.:—The appellants were charged before the Sessions Court at Muar as follows:—

(1) That you at about 2.50 p.m. on 23.12.53 at Parit Unas, Muar, in the State of Johore, were knowingly concerned in conveying uncustomed goods, to wit, 622 lbs. tobacco leaves, 32 packages cigars, 41 packages chewing tobacco and 8 dozen and 5 tins hair oil in Van No. BB 1138 with intent to defraud the Government of the duties thereon, to wit, $5,483.93 and that you have thereby committed an offence contrary to and punishable under s. 131(1)(e) of the Customs Ordinance 1952.

(2) That you at the same time and place were knowingly concerned in an attempt at fraudulent evasion of Customs Duty to wit, $6,941.33, being the duty payable upon 6 bundles of Tobacco Leaves weighing 913½ lbs. and that you have thereby committed an offence contrary to and punishable under s. 131(1)(g) of the Customs Ordinance 1952.

At the conclusion of the prosecution case, the learned President of the Sessions Court came to the conclusion that the prosecution had not made out a case which, if unrebutted, would warrant a conviction and he acquitted the appellants. From this acquittal on the first charge, the learned Public Prosecutor appealed. Having considered the appeal and the grounds of judgment of the learned President, Storr J. came to the conclusion that the learned President misdirected himself on the question of when the presumptions under section 115 and section 131(2) of the Customs Ordinance, 1952, arose and held that the learned President should have called on the appellants for their defence to the first charge, the subject of that appeal.

The order of acquittal was set aside and it was ordered that the case be sent back to the learned President for him to call upon the appellants for their defence to the first charge the subject of that appeal.

The learned President having called upon the appellants for their defence and having heard evidence and arguments by counsel found the appellants guilty of the charge, convicted them and sentenced the first appellant to a fine of $5,000 or in default nine months imprisonment and the second and third appellants each to a fine of $10,000 or in default fifteen months imprisonment.

This appeal is against those convictions.

The facts so far as it is necessary to state them, are as follows:—

On information received Tungku Yusof (P.W. 1), D.C.O. Muar, on the 23rd December, 1953 went to Parit Unas, off the main road, and there saw a van belonging to the firm Maniam & Co. of which the third appellant is the manager. The three appellants were in the van, the first appellant being the driver. The van was loaded with the articles mentioned in the charge, the tobacco leaves were wet in parts. The appellants were neatly dressed; there was no sign of mud on them. A short distance away from where the van was stopped there is a parit. There stuck in the mud (it was low tide) was a sampan; in the sampan there were several bundles of tobacco wrapped in matting; at one end of the sampan there was a tarpaulin at the other end about one-fourth of the load was uncovered. In the sampan there were 3 pairs of shoes one pair of which fitted one of the appellants. A search was carried out in the area around in about three feet high grass there was found an outboard engine and in another spot there were matting wrappings smelling of tobacco. Some of the packets of tobacco found in the van contain a label showing a trade mark and a Kuala Lumpur address and state they are made from best Malayan tobacco. On a packet with this trade mark there is a chop with the date 16th November 1953. The bottles of hair oil bear the name Mani Ram & Co., Kuala Lumpur.

The first appellant gave evidence on oath; the second appellant made a statement from the dock and the third appellant produced a written statement and with the statement he also produced 2 framed Trade Mark Registration Certificates in respect of cheroots, one file containing receipts from printers for tobacco packet wrapping cover, one file containing receipts from various local firms including one receipt from customs, in connection with hair oil preparations and one bundle of receipts showing purchase of local tobacco by the firm Maniam & Co. and one file of declarations to customs of dutiable imports relating to tobacco.

Briefly the story of the defence is that the van was loaded in Kuala Lumpur and that the first appellant, as driver, and the third appellant, the manager of the firm at Kuala Lumpur, left Kuala Lumpur on the 22nd December, 1953 at about 1.30 p.m. and went to Seremban then to Malacca and then to Muar. On the roadside at about 7 or 7.30 p.m. the third appellant saw the second appellant. The second appellant is an accounts assistant in Thaver & Co. Singapore, an associated company. The second appellant was on leave at that time and he took the opportunity to visit the Federation as he had never been up country before. The second appellant told the third appellant that he had a room at Muar and that he could accommodate the other two for the night. They proceeded to a hotel, had food and went to bed; the van had been locked and left by the hotel. Next morning all three proceeded to Batu Pahat; the van was not taken across the ferry. Here the third appellant visited some shops. Nothing was placed in the van since it left Kuala Lumpur. The appellants had gone to visit a temple which, it was suggested at the cross-examination of P.W. 1, was famous, even outside Johore, for its miracle cures.

The appeal is on the following grounds:

(1) there was no, or no sufficient, evidence against any of the appellants which if unrebutted would have warranted a conviction;

(2) if the presumption under ss. 115 and 131(2) applied to the facts proved by the prosecution, the prosecution adduced evidence of the articles and the conduct of the appellants was sufficient to rebut the said presumptions;

(3) the learned President erred as to the quantum of the evidence necessary to displace the presumption of law under the provisions of the said Customs Ordinance;

(4) the learned President did not give sufficient consideration to the evidence adduced by the appellants.

With regard to the first ground of appeal the learned Counsel for the appellants submitted that it was not clear what the judgment on appeal of Storr J. decided that is whether he simply held that the learned President misdirected himself on the question of when the presumptions under sections 115 and 113(2) arose or whether he also held that there was a case to answer. Both these matters were dealt with in the judgment and the learned Judge stated in no uncertain terms that the prosecution had established a case and that there was sufficient evidence which if unrebutted would warrant a conviction; he said: "I hold, therefore that the learned President should have called on the respondent for their defence to the charge mentioned above", and he further ordered that the case be sent back to the President for him to call upon the appellants

for their defence. The point in the first ground of appeal has, therefore, already been decided.

Before dealing with the other grounds of appeal, I consider it necessary, in view of the submissions made in this case, to make some general observations on certain aspects of the Law of Evidence. Submissions are frequently made in criminal trials to the effect that there is a fundamental difference in the law of evidence in criminal and in civil cases and that in criminal cases the burden of proof on the prosecution is different from that on the defence. In civil cases, it is said, a preponderance of probabilities is sufficient but in criminal cases the prisoner's guilt must be proved beyond reasonable doubt; with regard to the defence in criminal cases it is said that the burden of proof is not as high as that of the prosecution and that if the defence raises a reasonable doubt or if there is a preponderance of probabilities in favour of the accused, the accused is entitled to an acquittal.

Some confusion arises by the use of unreflective cliches and by recourse to English decisions and to statements therein without consideration to the relevant rules of evidence incorporated in the Evidence Ordinance, 1950.

There is no question that in English law and in this country there are important differences in the kind of evidence which is admissible in civil and in criminal cases, because it is felt that some kinds of evidence which are admitted in civil cases would unfairly prejudice the accused in criminal cases (see per Lush J. in *Hurst v. Evans*[1]); but apart from such exceptions there is no difference in the application of the rules of evidence to civil and criminal cases, to prosecution and defence, and on the evidence admitted, the methods of demonstration and inference do not differ in civil and criminal cases. In 9 *Halsbury's* Laws of England, 2nd edition, at para 265 it is stated :—

"The rules of evidence which govern the proof of facts in a criminal trial are substantially the same as those which apply in a civil trial, but there are some particular points of difference arising from the special nature of criminal proceedings."

And similarly, at para 278, with regard to the manner in which facts relevant to the issue must or may be proved.

It is a rule of prudence rather than law that requires more stringent proof in criminal than in civil cases.

The position has been clearly set out by C. K. Allen in the article "The Presumption of Innocence" in "Legal Duties" at p. 287 :—

"Again, "in a civil case a preponderance of probabilities is sufficient, but in a criminal case the prisoner's guilt must be proved beyond all reasonable doubt." This statement is constantly repeated in the text-books, but very little authority is cited for it, and it is difficult to know what real meaning is to be attached to it. Certainly it cannot mean that there is any substantive difference (except perhaps in certain offences where corroboration is required) between the methods of proof in civil and criminal cases, for it is laid down again and again that this is not the law. Is there any true difference between a preponderance of probabilities and a *reasonable* certainty (the converse of reasonable doubt)? 'Probability' may mean different things. It is often loosely used to indicate mere conjecture or plausibility. Neither in civil nor in criminal cases is a jury entitled to consider an averment established by conjecture or plausibility. But 'probability' may also mean the utmost degree of certainty or conviction which, upon the evidence of circumstances, things and statements, can be attained by our limited powers of reasoning and observation. That degree of certainty or conviction exists, or ought to exist, in the decision of any legal issue. It is difficult to see how men and women, called upon to weigh evidence either in civil or criminal matters, can bring to bear anything more than Pollock C.B. requires of them — i.e. 'that degree of certainty that you would act upon in your own grave and important concerns'; for indeed they have no other means of reasoning. The principle of 'reasonable doubt' therefore seems to be little more than a counsel of prudence; and there is considerable judicial authority for this view. The warning is not so frequently uttered in civil cases, because the occasion is not so solemn; but does it follow that the same degree of care and certainty is not as necessary, or at least as desirable, in the one case as in the other? I apprehend that a judge who directed a jury in an action for damages, 'You need not be as careful in arriving at your conclusions as if you were trying a criminal case' would considerably startle the legal world and the public; and though there is a good reason for reminding juries of the necessity for caution in criminal cases. I know of no authority for the proposition that their duty is any less when property, and not life or liberty, is at stake."

The background for the rule of prudence that requires more stringent proof in criminal than in civil cases is the presumption of innocence which came to maturity about 1865; with regard to this presumption Allen (*Op. cit.*) points out that :—

"Historically and logically, we are led to a conclusion which has the sanction of that great master of evidence, Wigmore — namely that the presumption of innocence amounts to little more than a caution to the jury not to arrive at hasty inferences and a reminder that affirmative allegations must be proved by those who make them, not disproved by those against whom they are made."

This caution has been expressed, in directions to the jury, in various forms : it was, I think, Martin J., who first used the expression "beyond reasonable doubt" in the case of *Reg. v. White*[2], decided in 1865 where in charging the jury he said that :—

"In order to enable them to return a verdict of guilty, they must be satisfied, beyond reasonable doubt, of his guilt; and this as a conviction created in their minds, not merely as a matter of probability; and if it is only an impression of probability, their duty is to acquit."

There is no standard formula of explaining to the jury the rule that the prosecution must prove its case and notwithstanding the remarks by the House of Lords in *Woolmington's*[3] and in *Mancini's*[4] *cases*, the Common Serjeant in *Kritz's*[5] *case* directed the jury that they must be "reasonably satisfied" of guilt and this direction was upheld on appeal (1950) 2 K.B.

82). In *Summers*[6] *case* Lord Goddard disapproved the "reasonable doubt" formulation.

The doctrine of reasonable doubt has been so constantly impressed upon juries that it has come to possess some of the characteristics of superstition. No satisfactory definition has been given of this phrase and any explanation that has been given is very confusing when considered in relation to the definition of "proved" in section 3 of the Evidence Ordinance, 1950. This Ordinance is in the main in accordance with English law though it does in several respects materially diverge from that law. English decisions serve as valuable guides and indeed are binding authorities where the English law has been followed in the Evidence Ordinance, but such decisions upon the meaning of particular words are of little or no assistance when those words have been specially defined in the Ordinance.

Section 3 of the Evidence Ordinance, 1950, defines "proved" as follows:—

"A fact is said to be "proved" when after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

This applies to civil and to criminal cases and to prosecution and defence; the mental process of induction and deduction is the same in all cases. In view of this definition, the word 'reasonable" in the phrase "reasonable doubt" would seem to denote a fluctuating and uncertain quantity of probability, and the question "what sort of doubt is 'reasonable'?" in criminal matters is a question of prudence. In view of this definition the best explanation of "reasonable doubt" is perhaps that given by Denning L.J. in *Miller v. Minister of Pensions*[7] where he said:—

"The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'Of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

The fundamental principle in criminal cases is that there is a burden on the prosecution, which never shifts, to prove its case; it is not upon the accused to prove his innocence and in that sense the burden on the defence is not as high as that of the prosecution; to entitle the accused to an acquittal it is sufficient if he raises a doubt in the prosecution case and this he may do by "disproving" a material fact on which the prosecution relies or by proving facts from which it may be inferred that a material fact on which the prosecution relies is not so probable that a prudent man ought to act upon the supposition that that fact exists.

The facts on which the defence rely must however be "proved" and they are proved not by showing merely a possibility that such facts exist but by showing a probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case.

I may finally add that the definition of "proved" in section 3 of the Evidence Ordinance, 1950, (which is identical to the Indian Evidence Act) reflects the trend of judicial opinion in England at the time when the rules of evidence were first codified in India, that is in 1855. In the case of *R. v. Burdett*[8] decided in 1820: in that case Best J. made the following observations —

"It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilised countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. Lord Mansfield, in the Douglas case, gives the reason for this.

"As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that Judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other." In the highest crime known to the law, treason, you act upon presumption. ..... Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised, as to the corpus delicti that it ought to be strong and cogent; but in part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption, as would satisfy me in the most trifling cause that can be tried in Westminster Hall."

And Abbott C.J. said:—

"No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends to be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"

A final word about statutory presumptions. By various statutes some matter is presumed "unless the contrary is proved" and the onus of proving this matter

is cast on the accused. Common examples of such presumptions are to be found in section 105 of the Evidence Ordinance, 1950, section 11 of the Common Gaming Houses Ordinance, 1953, section 5 of the Prevention of Corruption Ordinance, 1950, sections 115 and 131(2) of the Customs Ordinance, 1952. Objection has been expressed to this type of legislation because, it is stated, it reverses the traditional principle and deems the party to be guilty until he proves his innocence.

It seems to me, however, that these statutory presumptions are really nothing more than an extension of the provisions of section 106 of the Evidence Ordinance, 1950, which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

These statutory presumptions shift the burden of proving a particular fact on the accused. Burden of proof may mean the burden of introducing some evidence (evidential burden of proof) as for example in section 3(2) of the Bills of Exchange Ordinance, 1949, or it may mean the burden of satisfying the jury (persuasive burden of proof). *Prima facie,* it might be thought that the word "prove" used in criminal matters should be so construed as to uphold, rather than reverse, the principle of presumption of innocence, and the common law rule affirmed so emphatically by the House of Lords in *Woolmington's*[3] and that it becomes possible to read such statutes as referring to the evidential burden rather than the persuasive burden. This argument was adopted by the Court of Criminal Appeal in the case of *Ward*[9]. In the more recent case of *Jenkins*[10] the Court of Criminal Appeal held that "proved" in section 2 of the Prevention of Corruption Act, 1916, meant "established" and that if the jury had any doubt they ought to find the accused guilty. It was considered that this went too far and in the later case of *Carr-Briant*[11] the Court of Appeal said:—

"In our judgment, in any case where, either by statute or at common law, some matter is presumed 'unless the contrary is proved,' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

In this case, the burden of proof on the accused was held to be the persuasive burden and that such burden was discharged by evidence to satisfy the jury of the probability of the existence of the fact which the statute requires him to prove.

In view of the Evidence Ordinance, 1950, I do not see how "proved" in any statutory presumption can mean anything but "proved" as defined in that Ordinance. Whatever view one may take of the policy of the legislation, there is also some policy in giving words a consistent meaning and that is hardly done if "proved" is given a different interpretation from that in the Evidence Ordinance, 1950. For reasons which I have set out earlier the expression "beyond reasonable doubt" and "probability" in the *Carr-Briant case*[11] are liable to create confusion in view of the special provisions of the Evidence Ordinance, 1950.

After these preliminary general remarks, I now turn to deal with the other grounds of appeal in this case. I shall deal first with the third ground, that is that the learned President erred as to the quantum of the evidence necessary to displace the presumptions of law under the provisions of the Customs Ordinance. It seems clear from the grounds of judgment that the learned President adopted the principle of the balance of probabilities as a test for deciding the onus on the appellants. It is also clear from the grounds of judgment that the learned President considered this principle to be a lower standard of proof than that which rests on the prosecution in establishing a fact. For reasons which I have set out earlier in this judgment, if the learned President erred at all he erred in favour of the appellants.

The learned Counsel for the appellants referred to the case of *Rex v. Cohen*[12]. He submitted that this case sets out clearly the quantum of evidence necessary to enable the defendant to discharge the onus placed on him by section 131(2) of the Customs Ordinance, 1952, and that, notwithstanding that there is no provision in the Customs (Consolidation) Act similar to section 131(2) the principles laid down in this case should be followed and have been followed in dealing with the presumption under the said section 131(2); I was referred to the case of *Lee Guek Hon v. Public Prosecutor*[13]. I agree with this; but in view of what I have said earlier I do not consider that *Rex v. Cohen*[12] lays down different standards of proof from those laid down in the Evidence Ordinance, 1950. In *Lee Guek Hon's case*[13] the appellant was charged with knowingly being in possession of uncustomed goods. The burden of proving that the goods were customed and that he did not know that they were uncustomed was on the appellant. The appellant did not prove that the goods were customed but he gave an explanation which amounted to this: "I am not the importer and therefore I cannot produce a receipt for the payment of duties. I bought this watch from a trader in the ordinary way." In that case I held that this explanation should have satisfied the Magistrate, because, adopting the principles in the

definition of "proved", I considered that the explanation given, even when considered in connection with other evidence in the case, made the existence of the fact that the appellant had no knowledge that the goods were uncustomed so probable that a prudent man ought to act upon the supposition that that fact existed. Taking the whole evidence in this case I do not consider it is possible to say that there was evidence from which it could be inferred either that the duty on the goods in question had been paid or that the appellants did not know that the goods were uncustomed. I therefore agree with the conclusion arrived at by the learned President.

The second ground of appeal is that the evidence produced by the prosecution and the conduct of the appellants were sufficient to rebut the presumptions under section 115 and 131(2). The learned Counsel for the appellants submitted that the labels on some of the articles the subject of the charge raise a presumption that those articles did not come from outside the Federation. In ordinary circumstances this is so but the circumstances under which these articles were found strongly suggest that customs duties had not been paid thereon. With regard to the conduct of the appellants I do not see how in the circumstances of this case it can be said that the presumptions could have been rebutted.

With regard to the fourth ground of appeal, that is that the learned President did not give sufficient consideration to the evidence adduced by the appellants, the learned Counsel for the appellants referred me to the cases of *Lok Chak Wan v. Public Prosecutor*[14], *Rex v. Ayes*[15] and others to the effect that where the duty of giving an explanation is cast upon a defendant, and an explanation is given which is consistent with innocence, the Court must consider whether it might reasonably be true although not convinced of its truth. Counsel argued that the burden of proof on the defence as laid down in these cases is even lower than the test of the balance of probabilities.

With regard to the explanation given by the accused Goddard L. C.J. in *Rex v. Garth*[16] stated the law as follows:—

"I have more than once endeavoured to say what Abramovitch's Case does lay down, and it is this. Possession of property recently stolen, where no explanation is given, is evidence which can go to the jury that the prisoner received the property knowing it to be stolen. It must be borne in mind that the onus is always on the prosecution; but if the prisoner has given an explanation which raises a doubt in the minds of the jury on the question whether or not he knew that the property was stolen, then the ordinary rule applies and the case has not been proved to the satisfaction of the jury, and therefore the prisoner is entitled to be acquitted. It is not a question whether the prisoner gives an account which may possibly be true, as I have said, because any account may possibly be true. A much more accurate direction to the jury is: "If the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction."

It is clear from this statement that, as in every case, the explanation of the accused has to be considered together with the rest of the evidence in the case and that the accused will be entitled to an acquittal if, as a result of such explanation the existence of a material fact on which the prosecution relied is no longer so probable as to make a prudent man act upon the supposition that that fact exists.

In the present appeal, the learned President gave full consideration to the explanation given by the appellants and it is clear that he was not satisfied that it was true and it raised no doubt in his mind. The explanation could, naturally if taken by itself, be true in the sense that everything is possible but when considered together with all other proved facts in the case that explanation could not raise a doubt in the mind of a prudent man that it might be true.

No attempt was really made to show that duties on the goods in question had been paid, and it should not have been at all difficult to do so considering that the third appellant is the manager of the firm to which the goods belonged; in the circumstances it seems to me that apart from the presumption under section 115 of the Customs Ordinance, 1952, the burden of proving this fact would be upon the appellants by virtue of section 106 of the Evidence Ordinance, 1950.

In the case of *R. v. Ley & Smith*[17] the Lord Chief Justice in his summing up to the jury said:—

"The evidence that is called for the defence may have one of three different effects; it may convince you of the prisoners' innocence; it may throw some doubt on the evidence that has been given for the Crown that you may no longer feel satisfied that the prisoners are guilty; thirdly, it may and sometimes does strengthen the evidence which was given for the Crown."

In the present case the evidence adduced by the appellants has, to my mind, had the third effect.

The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Battenberg & Talma.*

CHEE SHIH KWANG v. PUBLIC PROSECUTOR

[A. Cr. J. (Buhagiar J.) April 13, 1955]

[K. L. — Criminal Appeal No. 18 of 1955]

Customs Ordinance, 1952, s. 131(1)(d) and (2) — Knowingly in possession of uncustomed goods — Burden of proof in cases of statutory presumption under s. 131(2).

The appellant in this case was found guilty and convicted under s. 131(1)(d) of the Customs Ordinance